

REDACTED DECISION – DOCKET NO. 12-179 CU

**By: MATTHEW R. IRBY, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON AUGUST 29, 2012
DECISION ISSUED ON FEBRUARY 25, 2013**

SYNOPSIS

TAX ADMINISTRATION -- DUTIES OF TAX COMMISSIONER -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

CONSUMERS SALES AND SERVICE TAX & SALES AND USE TAX -- DUTY TO COLLECT -- Article Fifteen of the West Virginia Tax Code imposes a general consumers sales and service tax, for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services, and it is the duty of the vendor to collect the same. *See* W. Va. Code Ann. §§ 11-15-1 and 11-15-3 (West 2010).

CONSUMERS SALES AND SERVICE TAX & SALES AND USE TAX -- FAILURE TO COLLECT -- If any vendor fails to collect the tax imposed by section three of this article, the vendor shall be personally liable for the amount the vendor failed to collect. *See* W. Va. Code Ann. § 11-15-4a (West 2010).

CONSUMERS SALES AND SERVICE TAX & SALES AND USE TAX -- PRESUMED TAXABLE -- “To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established.” W. Va. Code Ann. § 11-15-6(b) (West 2010).

CONSUMERS SALES AND SERVICE TAX & SALES AND USE TAX -- MAINTAINING TAX RECORDS -- “Every person doing business in the State of West Virginia . . . shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993).

CONSUMERS SALES AND SERVICE TAX & SALES AND USE TAX -- BEST INFORMATION AVAILABLE -- If, when auditing taxpayer records, said records are, “. . . inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993).

CONSUMERS SALES AND SERVICE TAX & SALES AND USE TAX -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is on the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void, or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

CONSUMERS SALES AND SERVICE TAX, SALES AND USE TAX -- BURDEN OF PROOF -- Where an assessment is based on a methodology developed to estimate the amount of tax due, to satisfy its burden of proving that the assessment is erroneous a taxpayer may not merely question the methodology of the assessment, but must provide credible evidence to support its position.

CONSUMERS SALES AND SERVICE TAX, SALES AND USE TAX -- BURDEN OF PROOF NOT MET -- The Petitioner failed to satisfy its burden of proof by reason of its failure to provide evidence to show that the Tax Commissioner had better information that was ignored regarding the prices the Petitioner charged or the actual amount of its sales.

FINAL DECISION

A tax examiner with the Field Auditing Division (hereinafter Division) of the West Virginia State Tax Commissioner's Office (Tax Commissioner or Respondent) conducted an audit of the books and records of the Petitioner, Company A. Thereafter, on March 26, 2012, the Director of this Division issued a consumers sales and use tax assessment against the Petitioner. The assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period January 1, 2009, through December 31, 2011, for tax in the amount of \$____, interest in the amount of \$____, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, on May 3, 2012, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010)

Subsequently, notice of a hearing on the petition was sent to the Petitioner, and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

FINDINGS OF FACT

1. Company A, engages in the business of operating a bar in a West Virginia City, in a West Virginia County.

2. On or about March 6, 2012, the auditors began to perform an audit in this matter, and the Petitioner provided “z” tapes¹ from the cash register used when operating the bar, particularly for the 2010 tax year, which was used as a sample tax year.

3. The auditors noted a number of discrepancies in the cash register tapes, including a large percentage of so-called “no sales” by the bar on a daily basis.

4. The auditors also added up the distributor records to determine the amount of alcohol that was purchased, both beer and liquor.

5. With regard to the liquor purchased, the auditors determined that seventeen shots can be made from a “fifth” of liquor², and then reduced the number to fifteen drinks to account for spillage³.

6. The auditors then added the beer purchases and the liquor drinks available, and determined the amount of alcohol purchased did not match up at all with the amount of alcohol sold according to the cash register tapes.

7. The auditors thus determined that the business did not keep complete and accurate records of all sales in the business.

8. Upon visiting the taxpayer’s business on two separate days, March 16, 2012, and March 21, 2012, the auditors determined that the beer sold for between \$2.25 for Stroh’s and

¹ A “z” tape is a cash register tape that is normally run at the end of the day showing a summary of that day’s sales, sometimes broken down by category. It will show consumers sales and use tax collected, and if there were any, “void sales” or “no sales,” and the amount of any void sales.

² It was noted by the auditors, that a significant amount of the liquor purchased wholesale was actually 1 liter bottles, which are thirty-three percent larger than a “fifth” of liquor.

³ It was also noted by the auditors that the seventeen-drink figure was already a number that was reduced for spillage.

Budweiser, and \$3.00 for Corona. The bartender reported to the auditors that the liquor was priced between \$3.00 and \$7.00.

9. The business also purchased a number of other items, and sold them at its business location in wide ranging prices, as determined by the auditors during their field visits on March 16, 2012, and March 21, 2012⁴. The auditors also detailed food purchases by applying a markup of two hundred percent, based on prior audit experience.

10. The auditors then determined what percentage of sales of food and beverages were attributable to gross sales for the 2010 tax year. The auditors then determined the percentage of underreporting of those particular sales for that given year. The auditor then applied that calculation to the food and beverage sales to determine the amount of underreporting per year, minus the included sales tax⁵.

DISCUSSION

The West Virginia Code provides that “[f]or the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected services . . . the vendor shall collect from the purchaser the tax as provided under this article . . . and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article” W. Va. Code Ann. § 11-15-3(a) (West 2010). A vendor is defined as “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property” W. Va. Code Ann. § 11-15-2(26) (West 2010).

Likewise, the Code provides that “[t]he purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitutes a part of the sales price, and is

⁴ The auditors acknowledged that they used 2012 prices in determining the price of the food and other items, and that the price may therefore be overstated.

⁵ The auditor “backed the sales tax” out of the reported figure, stating that she knew the sales tax was included into the gross sales price.

collectible by the vendor who shall account to the state for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4(a) (West 2010).

The consumers sales and service tax regulations provide that “[e]ach vendor shall collect from the purchaser the consumers sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code R. § 110-15-4.1. (1993). To this end, “[i]f any vendor fails to collect the tax imposed by section three of this article, the vendor shall be personally liable for the amount the vendor failed to collect . . .” W. Va. Code Ann. §11-15-4a (West 2010).

In accounting for the proper amount to be remitted, all taxpayers must comply with the Consumers Sales and Service and Use Tax Regulation 110-15-14a.1, which states that, “[e]very person doing business in the State of West Virginia . . . shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993). Further, “if records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993).

In this case, the Petitioner provided appropriate records, including z-tapes to the auditors. However, those records were deficient because the sales figures were dramatically lower than the purchases made by the business. Thus, the records were not complete and accurate.

Because Petitioner did not have complete and accurate records as required by consumers sales and use tax regulation West Virginia Code of State Rules Section 110-15-14a.1, the tax auditors testified that they determined that the only way to arrive at the best information

available pursuant to West Virginia Code of State Rules Section 110-15-14b.4 was to calculate the amount of alcohol that was purchased, and apply that to the sales price of the alcohol. This was done for the entire sample year of 2010 and then applied to tax years 2009 and 2011.

Based upon the survey conducted, the auditors for the Respondent determined the amount of alcohol sales that were underreported, reduced that number by an included sales tax, and then determined the percentage that the business underreported for the sample year. The auditors then applied that sample underreported percentage to the other tax years covered by the audit to determine the amount of underreported sales for the period of the audit.

First, the Petitioner argued that it correctly reported all sales. However, this clearly is not the case. The auditors testified that in a sample week in June of 2010, the Petitioner's z-tapes reflected 782 sales of alcohol and 591 no sales. However, the Petitioner purchased approximately 1,230 salable drinks during that same week based on accounting for only fifteen shots⁶ per liquor bottle purchased, and counting every bottle of beer purchased. Thus, the auditor's attributable sales are still significantly less than the total amount of sales and no sales found on the z-tapes for the period. The notion that the sales were correctly reported defies the evidence presented at the hearing.

Next, the Petitioner argued that the audit was inaccurate for a number of pricing reasons. First, the Petitioner argued that the audit was based on static pricing, which is not present in a bar. Next, the Petitioner made a related argument that the auditors used incorrect pricing.

These arguments have no merit. The auditors made two field visits, to the bar in question, to determine the price of the alcohol, and used the pricing information given to the auditors by the bartender, as well as the price of goods that was posted in the bar. While the

⁶ Although this tribunal notes that the auditors could have used twenty-two shots as the number per bottle as opposed to the fifteen shots the auditor actually used.

Petitioner argued that these prices were the cost of the goods in 2012, and stated different prices, the cash register z-tapes provided no clarification that these were accurate prices.

Finally, the Petitioner argued that the auditor made no concession for spillage and breakage. However; the auditor clearly stated in her testimony, that when the audit was performed the auditors accounted for breakage and spillage when determining the total sales attributable to the business.

The Petitioner has the burden of proof. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010). Stated differently, the Tax Commissioner's assessment is presumed to be correct. Thus, when a taxpayer is assessed, it must prove that the assessment is incorrect. As part of its burden of proof, a Petitioner must present evidence to show the Tax Commissioner's alleged errors. Thus, it is part of the Petitioner's burden of proof to show that it correctly reported its sales or having incorrectly reported its sales must provide some credible evidence to support its position. It is not sufficient for the taxpayer to keep inadequate records, and then simply provide different possible numbers to calculate the tax due in response to a duly performed audit. Because the Petitioner was required to present credible evidence to support its position, but never did so, its burden of proof was not met.

CONCLUSIONS OF LAW

Based upon all the above, it is **DETERMINED** that:

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. Article Fifteen of the West Virginia Tax Code imposes a general consumers sales and service tax, for the privilege of selling tangible personal property or custom software and for

the privilege of furnishing certain selected services, and it is the duty of the vendor to collect the same. *See* W. Va. Code Ann. § 11-15-1 and § 11-15-3 (West 2010).

3. If any vendor fails to collect the tax imposed by section three of this article, the vendor shall be personally liable for the amount the vendor failed to collect. *See* W. Va. Code Ann. § 11-15-4a (West 2010).

4. “To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established.” W. Va. Code Ann. § 11-15-6(b) (West 2010).

5. “Every person doing business in the State of West Virginia . . . shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993).

6. If, when auditing taxpayer records, said records are, “. . . inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993).

7. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is on the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

8. Where an assessment is based on a methodology developed to estimate the amount of tax due, to satisfy its burden of proving that the assessment is erroneous a taxpayer may not merely question the methodology of the assessment, but must provide credible evidence to support its position.

9. The Petitioner failed to satisfy its burden of proof by reason of its failure to provide evidence to show that the Tax Commissioner had better information that was ignored regarding the prices the Petitioner charged or the actual amount of its sales.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the consumers sales and use tax assessment issued against the Petitioner for the period January 1, 2009, through December 31, 2011, for tax in the amount of \$____, interest in the amount of \$____, and additions to tax in the amount of \$____, for a total assessed tax liability of \$____, should be and is hereby **AFFIRMED**.

Interest continues to accrue on the unpaid tax until this liability is fully paid pursuant to West Virginia Code Section 11-10-17(a).

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack ⁷
Chief Administrative Law Judge

Date Entered

⁷ Administrative Law Judge, Matthew R. Irby, heard this matter and wrote this decision; however, Judge Irby is no longer employed with the West Virginia Office of Tax Appeals. Therefore, this decision was signed by Chief Administrative Law Judge A. M. "Fenway" Pollack.